35241-2-III
(consolidated with 35746-5-III)

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERICKA HELLER, a/k/a ERICKA McCANDLESS, APPELLANT

IN RE PERSONAL RESTRAINT OF:

ERICKA HELLER, a/k/a ERICKA McCANDLESS, PETITIONER

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was there sufficient evidence to prove beyond a reasonable doubt that Ericka McCandless was the driver of the F-350 that was involved in a high-speed chase with Spokane Sheriff's deputies on November 2, 2016?
2. Did the State violate the Defendant's 6th Amendment rights by not calling Justin Alderson as a witness, and instead, having Cpl. Thurman present a summary of what Alderson told him, and that he verified the alibi?
3. Should a person be charged with the separate crime of Hit and Run when a collision is caused by a law enforcement officer while the person is attempting to elude the officer?
4. Should the charge of Obstructing a Law Enforcement Officer be merged into the charge of Attempting to Elude?
5. If the convictions are affirmed; should this case be remanded to the superior court to correctly calculate pre-sentence credit for time served and allocate the credit for time served between the felony and gross misdemeanor sentences?

II. SUMMARY OF CASE

On November 2, 2016, near the intersection of Pines and Sprague in Spokane Valley, after an extended eluding attempt by the defendant Erika

McCandless, an innocent bystander, Justin Alderson,[1] was bitten by police dog Laslo.

III. STATEMENT OF THE CASE

On November 2, 2016, a stolen white Ford F-350 began its attempt to elude the police in the area of Barker Road and East Cowley Avenue,[2] and a high-speed chase reaching speeds of over 80 mph continued for almost ten minutes,[3] culminating in the vehicle losing control and spinning

[1] Mr. Alderson was identified by Corporal Jeff Thurman and R'shelle Parkhurst, an employee of the Pines-Sprague Walgreens, who had just sold cigarettes to Mr. Alderson.

[2] Deputy Sky Ortiz was on patrol on November 2, 2016, at approximately 8:40 p.m. when he observed a Ford F-350 truck fail to stop at a stop sign on East Cowley Avenue at the intersection with North Barker Road. RP 54-55. It was ultimately determined that the vehicle was stolen three days earlier from Robert Gregory. RP 37-46.

[3] The appellant does not contest the sufficiency of the evidence for an attempting to elude conviction, but suggests there was insufficient evidence identifying Ms. McCandless as the driver of the vehicle. The eluding was serendipitously recorded by the Sheriff's helicopter on a training run, and that recording has been included in the exhibits designated by the respondent. Ex. P2; RP 221. The video begins around 20:38:54 (military time) and one can hear the pursuit officer giving directions and speeds of the eluding vehicle to the helicopter. At approximately 20:41:43, the visual of the chase is picked up by the helicopter, which switches between a regular view and a heat view. (FLIR is an acronym for Forward-Looking Infrared RP 219.) The video shows the truck losing control and spinning 360 degrees (20:47:55) and the heat signature of Ms. McCandless leaving the truck and running to another vehicle at 20:48:08-16. She then runs around that vehicle and drops down and is arrested at 20:48:20.

out at the intersection of Sprague and Pines at 8:47:55 p.m. Ex. P2 at 20:47:55.

Throughout the duration of this high-speed chase, R'shelle Parkhurst was working at the Walgreens at Pines and Sprague Avenue. RP 145.[4] As she was working the front cash register, she noticed a gentleman, later identified as Justin Alderson,[5] enter the store "that was rather fidgety, so [she] paid attention to his hands and then made note that he had blond hair, a ponytail, and a black jacket on." RP 145-46. She paid attention to Mr. Alderson because he looked like a transient, and they had a significant number of transients come into their store due to its close location to the bus stops on Sprague and Pines. RP 147.

After Mr. Alderson was in the store for five to ten minutes, he approached the checkstand and purchased a pack of Camel Turkish Royal cigarettes. RP 147. This purchase stood out in Ms. Parkhurst's mind because, "most people when they come in and purchase Camels, they're

[4] Her shift was from 2:00 p.m. until 10:30 p.m. on November 2, 2016. RP 145.

[5] On November 2, 2015, Ms. Parkhurst positively identified Justin Alderson as the person who had been buying cigarettes at Walgreens. RP 166-67, 178. She also identified him at trial from a photograph as being the person buying cigarettes just moments before the F-350 spun out in front of the Walgreens. Ex. P10; RP 149.

going to purchase the Camel 99's or the 99 Blues. So the Turkish Royals, it's kind of, oh, yeah, that's something different." RP 147.

During this time frame, Ms. Parkhurst also heard the sounds of numerous distant police sirens, which struck her as unusual for a weeknight, sounds she could hear while the blond-haired, pony-tailed, black-jacketed Mr. Alderson was in the store; the sirens sounded closer just after he left the store. RP 148. After Mr. Alderson left the store, and as Ms. Parkhurst was conversing with a subsequent customer who was wearing a white shirt, she heard screeching tires. *Id*. Ms. Parkhurst looked out the front windows of the store and saw the white F-350 truck apparently hit the middle median and then spin around backwards. *Id*.

Just minutes before this spinout, Corporal Jeffrey Thurman, a K-9 handler, responded to the eluding call and ended up in the "number 2" position in the pursuit as the white F-350 approached Pines and Sprague, where the vehicle started to turn and spin. RP 161-62. As the vehicle was spinning, Corporal Thurman noticed a male running easterly from the truck, and deployed Laslo, his patrol dog. RP 162-64. After the truck finished rotating, the driver's door opened and a female exited the truck from that door. RP 162. She then ran easterly down Sprague where she attempted to enter an uninvolved citizen's vehicle. RP 162-64.

After observing the female exit the driver's side of the pickup, Corporal Thurman became uncertain whether the running male had ever been in the truck; he tried to recall Laslo and redirect him to the running female, but it was too late: Laslo had already taken the running male down. RP 163-64.

Corporal Thurman had Laslo release his grip on the male, Mr. Alderson;[6] Thurman handcuffed him, and after handcuffing him, had a conversation with him. RP 165.

After conversing with Mr. Alderson, Corporal Thurman went to Walgreens and asked Ms. Parkhurst whether a gentleman had just entered her store to purchase Camel cigarettes. RP 148, 165-66. She confirmed that a gentleman with a black coat came in to purchase Camel cigarettes. Corporal Thurman thanked her and left the store. RP 148-49, 166. Corporal Thurman returned and asked Ms. Parkhurst to accompany him to where Mr. Alderson was being detained. She did as he requested, and she confirmed that Mr. Alderson was the male that had just left the Walgreens after purchasing cigarettes. RP 166-67, 178. In fact, she was positive,

[6] Corporal Thurman also identified exhibit P10 as a picture of Mr. Alderson, and additionally, as the male the clerk identified as the person that had just purchased cigarettes at Walgreens. RP 170-71.

"without a doubt," that Alderson was the same man who had just purchased cigarettes in Walgreens. RP 149.

At trial, Corporal Thurman identified the defendant, Ms. McCandless, as the female that had exited the driver's door of the F-350, before running from the scene and attempting to enter the uninvolved citizen's car. RP 162-64, 167.

Prior to closing arguments, the jury was instructed on the four criminal charges set forth in the Information:

> Count 1. Possession of a Stolen Motor Vehicle;
>
> Count 2. Attempting to Elude a Police Vehicle;[7]
>
> Count 3. Failure to Remain at the Scene of an Accident - Attended Vehicle; and
>
> Count 4. Obstructing a Law Enforcement Officer.

The jury returned a verdict of not guilty on Count 1 and guilty on the remaining counts. They answered the attempt to elude special verdict form "Yes." CP 125-129; RP 336-337.

Ms. McCandless was sentenced on April 18, 2017. She had 19 prior felonies, and an offender score of "9+." CP 178. The court determined that

[7] The attempt to elude also had a special verdict form asking, "Was any person, other than Ericka McCandless or a pursuing officer, threatened with physical injury or harm by the actions of Ericka McCandless during her commission of the crime of attempting to elude a police vehicle." CP 127.

the standard range for the felony eluding was 22-29 months plus 12 months and a day consecutive for the enhancement for a total of 34-41 months plus a day.

The Court sentenced Ms. McCandless to the maximum of the range of the felony eluding, plus the enhancement, for a term of confinement of 41 months and a day. The Court then imposed 364-days on each of the gross misdemeanors, and ran those sentences concurrently with each other, but consecutive to the felony sentence, for a total of 53 months. RP 180; CP 164.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S UNANIMOUS VERDICTS IN BOTH THE ELUDING AND FAILURE TO LEAVE INFORMATION AT THE SCENE OF AN ACCIDENT CONVICTIONS.

1. Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed *de novo*. *Rich,* 184 Wn.2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each

element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

Appellate courts assume the truth of the State's evidence, *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); view reasonable inferences from the evidence in the light most favorable to the state, *id.*; and deem circumstantial and direct evidence equally reliable, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875,

774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. *Jackson*, 112 Wn.2d at 875.

2. Application of the standard of review in this case.

a. Attempt to elude.

Defendant complains there was insufficient evidence to convict her at trial for eluding and for the failure to leave information at the scene of an accident. As to the first claim, defendant alleges the evidence was insufficient to show that she was the driver of the F-350 pickup truck. There was sufficient evidence to establish that Ms. McCandless was the driver of the Ford F-350.

After the nine-minute high speed chase, beginning on Barker Road and ending after the stolen truck spun out at Pines and Sprague Avenue, the driver's door opened and defendant Ms. McCandless exited the truck from that door. RP 162 (Corporal Thurman's testimony). She was the *only one* observed by Corporal Thurman who exited the driver's side door of the truck. RP 163. He then observed her flee the scene and attempt to enter an uninvolved citizen's vehicle. RP 162-64, 186. Corporal Thurman positively identified Ms. McCandless in court as the person who exited the driver's

door of the Ford F-350 pickup truck after it spun to a stop. RP 167.[8] Corporal Thurman determined that Mr. Alderson had purchased cigarettes at the Walgreens on the corner of Pines and Sprague just before Ms. McCandless crashed the F-350 at that intersection. This was the testimony of both Ms. Parkhurst and Corporal Thurman.

Simply, the evidence shows in this case that only one person exited the driver's side, that being the defendant, Ms. McCandless, and only one person exited the passenger side of the stolen F-350, Ms. Milhouse.[9] The jury was free to find that Ms. Parkhurst and Corporal Thurman were credible witnesses presenting credible evidence which inculpated the defendant, Ms. McCandless, as the driver, and exculpated Mr. Alderson.

b. Failure to leave information at the scene of an attended collision (hit and run).

The defendant contends there was insufficient evidence establishing she *knew* she was involved in a collision with Deputy Rassier as he

[8] Another female, Ms. Milhouse, exited the passenger side door and immediately laid down on the ground. RP 96. Deputy Whapeles recognized her from prior contacts as Amanda Milhouse. RP 97.

[9] Defendant claims Ms. Brazzell, who had been dining at the Denny's at the northeast corner of Sprague and Pines, had an unobstructed view and identified the person that exited the driver's door of the truck as Mr. Alderson. However, this is incorrect. Her direct testimony refutes this claim. Ms. Brazzell clarified she did not know if the person exiting the vehicle was a male or female. RP 240. In fact, she was certain there was only one person running from the truck. RP 242.

attempted to pin the stolen F-350 to the curb to prevent her from driving away from the curb that had momentarily stopped her in her attempted eluding. This contention fails because the evidence was sufficient for a jury to infer that Ms. McCandless would realize she had been involved in a collision, where the testimony established the impact was violent, and where the testimonial and pictorial evidence establishes that the pursuit vehicle was itself damaged by the impact of the collision.

After pursuing Ms. McCandless at speeds of 45-100 mph,[10] Deputy Rassier followed the truck as it turned northbound on Herald, sliding into a curb. RP 117. When the truck hit the curb and stopped, Deputy Rassier attempted to pin the truck's right rear wheel with his patrol car, but the maneuver was unsuccessful, and the truck sped away. RP 118, 135-36. As the truck sped away, the front left side of the patrol car was damaged from patrol car's impact with the truck. RP 129-30. Deputy Rassier was violently jolted by the collision. RP 130. Exhibits P8 and P9 were introduced showing the damage to the patrol car. RP 129-30.

The jury could infer from Deputy Rassier's testimony and exhibits that the defendant would physically feel, hear, and/or see the impact of the truck she was driving when it crashed into Deputy Rassier's patrol car. The

[10] RP 114.

defendant does nothing to refute Newton's three laws of motion.[11] The defendant's claims regarding the sufficiency of the evidence are without merit.

B. THERE WAS NO CONFRONTATION VIOLATION.

Defendant complains of two answers given by Corporal Thurman, alleging the statements violated Ms. McCandless's right to confrontation. Dealing with the statements separately is necessary because there was no objection made to the first statement, and an objection was made and sustained regarding the second statement, and the jury was instructed to disregard that question.[12]

1. First statement.

The first response and question dealt with whether Corporal Thurman went to any other businesses other than Walgreens to

[11] The three laws proposed by Sir Isaac Newton to define the concept of force and describe motion, used as the basis of classical mechanics. The first law states that a body at rest tends to stay at rest, and a body in motion tends to stay in motion at a constant speed in a straight line, unless acted upon by a force. The second law states that the acceleration of a body is equal to the force acting upon it divided by the body's mass. The third law states that for every action there is an equal and opposite reaction.

[12] The appellant's brief must have inadvertently left out the fact that the trial court sustained an objection and the trial court instructed the jury to disregard the question. The appellant's brief contains the questions and answers given, as well as the fact that an objection was made, (Br. of Appellant at 14), but the court's response *sustaining* the objection and *granting* the motion to strike occurs where the appellant's brief uses an ellipsis to indicate missing text.

confirm Alderson's alibi, to which Corporal Thurman answered, "No, I did not."[13] RP 179. This answer does not contain any out-of-court statements made by a third party not subject to cross examination. Moreover, there was no objection interposed by the defendant to preserve the issue, if it exists, on appeal.

It is a fundamental principle of appellate jurisprudence in our state that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*,

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[13] *See* RP 179, questions by prosecutor:

> Q. Corporal Thurman, you contacted Justin Alderson, the man who ran away from the direction of the F350, and you had a conversation with him, correct?
>
> A. That is correct.
>
> Q. After the conversation you went to Walgreens. Did you go any other places, any other businesses other than Walgreens to try to confirm his alibi?
>
> A. No, I did not.

where the court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
>
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically, regarding RAP 2.5(a)(3), this Court has indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

Ms. McCandless fails to address the requirement of manifest error under RAP 2.5(a)(3). The word "manifest" is not contained in her brief. However, this Court need not even reach that rule because the defendant's obligation to assert her right to confrontation at or before trial is *more* fundamental - it "is part and parcel of the confrontation right itself.... When a defendant's confrontation right is not timely asserted, it is lost." *State v. O'Cain*, 169 Wn. App. 228, 240, 279 P.3d 926 (2012) (citing *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 326, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In this case, any potential issue regarding confrontation was lost by the defendant's failure to object.

Even if the error were considered not waived, any error could not be considered "manifest." The focus of RAP 2.5 analysis is on whether the error is so obvious on the record as to warrant appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Here, because no hearsay declarant's testimony was introduced, Ms. McCandless fails to demonstrate the trial court would consider the deputy's response an obvious confrontation violation. A "manifest" error is one that is "obvious." *Id.* at 99-100. Importantly, "[i]t is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.*

2. Second statement.

It is more than interesting to observe that Ms. McCandless fails to note that an objection *was made and sustained* regarding the second question, or answer, and that the trial court instructed the jury to disregard the question.[14] Instead of noting the trial court's ruling, Ms. McCandless

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[14] Q. (By Prosecutor): Okay. And why not?

A. Because I believed him and I had the –

MR. GRIFFIN: Objection, Your Honor.

THE COURT: Well, just one moment. Wait. Just one second. Just one second. Basis for the objection?

MR. GRIFFIN: Judge, I think he's commenting on the veracity of another potential witness in this case. I don't think it's proper. I would ask the Court to instruct the jury to disregard, please.

THE COURT: You may respond, Mr. Johnson.

MR. JOHNSON: I think as to that narrow objection, I understand the objection and I agree. I'll refocus my question.

THE COURT: All right. And the jury will disregard the prior question. Mr. Johnson will refocus -- restate.

BY MR. JOHNSON:
Q. And I'm not asking for a comment on credibility, but in terms of your investigation, were you satisfied that you had gone enough places to confirm the location of Justin Alderson during the time of this elude?

A. That is correct.

MR. JOHNSON: Okay. All right. Thank you.

THE COURT: Mr. Griffin.

RECROSS-EXAMINATION BY MR. GRIFFIN:

uses ellipsis in her brief in place of the trial court's evidentiary ruling. Br. of Appellant at 14 (ellipsis), 25-26 (argument). Because the objection was sustained, and because the trial court instructed the jury to disregard the question, no error has occurred. Appellate courts presume that jurors follow the trial court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995); *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Ms. McCandless does not argue otherwise. The jury followed the trial court's limiting instruction and Ms. McCandless's satisfaction with that result is evidenced by her failure to object further.

There was no confrontation violation, or any issue preserved for appeal in this regard.

C. THE DEFENDANT'S CONVICTION FOR FAILURE TO REMAIN AND PROVIDE INFORMATION AT THE SCENE OF AN ATTENDED ACCIDENT WAS PROPER.

Ms. McCandless claims she was improperly convicted of failing to leave information at the scene of an attended accident because she was intentionally eluding the police vehicle. In support of her claim,

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> Q. Did Ms. Parkhurst at Walgreens suggest that Mr. Alderson had purchased any beer when he was there?
>
> A. Not that I recall.
>
> MR. GRIFFIN: Okay. Thank you, sir. That's all I have.

RP 179-180.

Ms. McCandless assumes she was not the cause of the collision. However, there was no finding to that effect, and there was no testimony to that effect; the only testimony relating to that issue establishes she was the one that caused the collision.[15] Therefore, her reliance on *City of Spokane v. Carlson*, 96 Wn. App. 279, 979 P.2d 880 (1999), is misplaced. That case stands directly for the proposition that the driver of the vehicle causing the accident must stop. The rest of that case that inferentially exempts the driver of the struck car, a driver not before the court in that case, is *obiter dictum* and not well-taken.

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[15] Q. (By Prosecutor): Okay. And you've testified that, while you were trying to do that, the vehicle accelerated and ended up colliding with your vehicle?

A. (By Deputy Rassier): Right.

Q. Okay. And then the vehicle continued traveling northbound on Herald; is that right?

A. Yes.

RP 139.

Q. (By Defense Counsel Mr. Griffin): But your testimony is that, if I understand it, the truck's the one that caused the collision, and it did so by accelerating to the north?

A. (Deputy Rassier): Correct.

RP 140.

There is no "hit and run" statute.[16] To the extent courts use this nickname, it is a misnomer and only furthers a misunderstanding of the law as it regards the duty of *any* individual *involved in an accident* to stop as closely to, and remain at the scene of the accident until the statutory duties are completed. What is clear, other than in collisions involving unattended property or unattended vehicles,[17] is that causation is *not* an element of the crime of failing to leave information at the scene of an attended accident. "There is no requirement under the hit-and-run statute or in Washington cases interpreting it that suggests a person must proximately cause a collision or engage in illegal behavior to be 'involved in an accident.'"

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[16] Ms. McCandless was charged in Count 3 with "failure to remain at the scene of an accident – attended vehicle or other property," (CP 12) and thereafter convicted of violating that charge, which provides:

> A driver of *any* vehicle *involved in an accident* resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

RCW 46.52.020(1) (emphasis added).

[17] RCW 46.52.010 requires the operator, because there is only one operator, of a vehicle to stop and notify the owner when that operator collides with unattended property such as fences, or unattended vehicles, such as parked cars.

State v. Perebeynos, 121 Wn. App. 189, 194, 87 P.3d 1216 (2004). The statute requires *all* drivers of *all* vehicles *involved* in an attended accident to perform certain duties including remaining at the scene. This Court noted this distinction in *State v. Hughes*, 80 Wn. App. 196, 200, 907 P.2d 336 (1995), wherein it discussed the legislative history of the statute and found that it did not even require actual contact between vehicles; it required only the fact of being *involved* in an accident:

> Washington's first hit-and-run statute imposed affirmative duties (to stop, assist and report) on any person operating or driving a motor vehicle on a public highway and "coming in contact with any pedestrian, vehicle or other object on such highway." Laws of 1927, ch. 309, § 50, pp. 809-10. In 1937 the Legislature revised the statute, dropping the express contact requirement except when a driver collides with an unattended vehicle. The duties of an operator of a vehicle "which collided with any other vehicle which is unattended" were separated from the duties of an operator of a "vehicle involved in an accident" resulting in the injury to or death of any person, or other property damage, or damage to a vehicle which is driven or attended. Laws of 1937, ch. 189, §§ 133, 134, pp. 917-18. Language amending an unambiguous statute is presumed to be intended to change the law. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 438, 858 P.2d 503 (1993).
>
> The current statutes retain the 1937 distinction: RCW 46.52.010 describes the duties of an operator of a vehicle "which collided with any other vehicle which is unattended" and those of the driver of a vehicle "involved in an accident" resulting only in damage to property on or adjacent to any public highway, while RCW 46.52.020 describes the duties of any driver of any vehicle "involved in an accident" resulting in injury or death, or damage to an attended vehicle, or damage to other property. Harmonizing

> the two statutes and giving effect to both, we conclude the Legislature did not intend that the duty to stop, identify and render aid in an injury accident be interpreted so narrowly as to attach only to the driver of a vehicle which collided with another; otherwise, it would not have dropped the express contact requirement.

As in *Hughes*, Ms. McCandless's interpretation does not serve the underlying rationale of facilitating investigation of accidents, identifying those involved, and providing immediate assistance to those potentially injured. One overarching reason for the failure to remain law is to identify those involved in such collisions; Ms. McCandless was trying to avoid being identified and was trying to avoid any exchange of such information. Her conviction for her failure to remain at the scene of the accident in which she was "involved" is well-supported by the law and the record.

D. THE ELUDING CONVICTION AND THE OBSTRUCTING CONVICTION DO NOT MERGE.

Ms. McCandless alleges the eluding conviction merges with the obstructing conviction and violates the double jeopardy clauses of the federal and state constitutions. She is incorrect.

Washington courts apply two distinct tests for assessing whether double jeopardy precludes two convictions. First, when a defendant suffers multiple convictions for violating several and distinct statutory provisions, the courts apply the "same evidence" test. *State v. Adel*, 136 Wn.2d 629, 632-35, 985 P.2d 1072 (1998). The "same evidence" test applies in this

case[18] because the statutory provisions for obstructing and eluding are in different titles and involve different statutes.[19] Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses that are the same in law and in fact. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Because the two criminal acts in this case are not the same in law or in fact, there is no double jeopardy violation.

As noted by Ms. McCandless in her brief, "[t]he State argued [in closing argument] that the Obstructing charge was based on Ms. McCandless's attempt to run away from the truck *after* the truck crashed *and the chase ended* at Sprague and Pines. RP 297-98 and CP 143." Br. of Appellant at 30 (emphasis added). Indeed, that was the prosecutor's theory of the case. RP 297-99. The prosecutor noted that an obstruction charge does not require that Ms. McCandless "be a driver at all." RP 299. Therefore, the two convictions are based upon different facts: the eluding is for the events involving the *driving* of the stolen F-350 truck; and the obstructing is for the events after the eluding ended, when the defendant fled from the stolen F-350 and tried to enter someone else's vehicle.

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[18] The other test involves cases where a defendant has multiple convictions for violating the same statute. In those situations, the courts apply the "unit of prosecution" test. *Adel*, 136 Wn.2d at 634.

[19] Attempt to elude a police vehicle is contained in RCW 46.61.024, and obstructing a law enforcement officer is contained in RCW 9A.76.020.

The charges are also not the same in law. The crime of attempting to elude requires proof the defendant was driving; and, while driving, was signaled to stop by a uniformed police officer, that the officer's vehicle was equipped with lights and siren; and that while being signaled to stop, the driver engaged in reckless driving. *See* CP 112 (to-convict instruction for attempting to elude). None of these elements are required for the crime of obstructing a law enforcement officer. *See* CP 120 (to convict instruction for obstructing). Ms. McCandless's claim of double jeopardy is without merit. The offenses are neither legally identical, nor based on the same act.

E. THE DEPARTMENT OF CORRECTIONS AND THE JAIL CERTIFICATION OF GOOD TIME CREDIT CONTROLS THE AMOUNT OF GOOD TIME CREDIT AS WELL AS THE CREDIT FOR TIME SERVED. THE ORDER CLARIFYING JUDGMENT AND SENTENCE, AND WARRANT OF COMMITMENT, PROPERLY SETS FORTH THAT THE FELONY TIME IS TO BE SERVED IN DOC CUSTODY, AND THAT THE GROSS MISDEMEANOR TIME IS TO BE SERVED LOCALLY.

In her appeal, Ms. McCandless complains that the trial court failed to properly designate that her gross-misdemeanor sentences of 364 days were to be served locally at the jail. The original judgment and sentence did not set forth that requirement, that the misdemeanor would be served in jail, rather than in prison. However, left undiscussed by Ms. McCandless, but designated in the record *she* provided to this Court, is an Order Clarifying Judgment and Sentence, and Warrant of Commitment, entered on July 6,

2017. CP 195-96. That judgment properly designates that she will serve her misdemeanor time locally, after her felony time is completed. CP 196 ("41 months plus one day in DOC custody, followed by 364 days local time in the Spokane County Jail"). Therefore, her complaint regarding the separation of the prison and jail sentences is mooted by the amended order.

As to her complaint regarding credit for time served, that complaint is not based on accurate math. The elapsed time *between*[20] November 2, 2016 (the jail booking date, CP 1), and the date of sentencing,[21] April 14, 2017, is 163 days:

11-02-16 – 11-30-16	=	28
December 2016	=	31
January 2017	=	31
February 2017	=	28
March 2017	=	31
04-01-17 – 04-14-17	=	14
Total	=	163

Therefore, Ms. McCandless's claims regarding credit for time served and the requirement that her misdemeanor sentence be served in a jail facility are, similarly, without merit.

[20] Not counting the first day, but counting the last day.

[21] Sentencing was held and completed on April 14, 2017. CP 187.

F. RESPONSE TO PERSONAL RESTRAINT PETITION: PETITIONER'S PERSONAL RESTRAINT PETITION REGARDING GOOD TIME CREDITS IS WITHOUT A BASIS.

As above, the trial court properly calculated the credit for time served at 163 days, at the time of her sentencing, April 14, 2017. Additionally, the jail, and not the trial court, is responsible for certifying the amount of time and earned early release credit ("good time credit") to the Department of Corrections ("Department") when the defendant is transferred to the Department's custody. Ms. McCandless fails to allege, let alone establish, that either the Spokane County Jail, or the Department, has not properly credited her for her "good time," or her time served. Her petition fails for that reason alone. *See Matter of Moncada*, 197 Wn. App. 601, 604-06, 391 P.3d 493 (2017). The petitioner must demonstrate that she has competent, admissible evidence to establish the facts that entitle her to relief. In fact, Ms. McCandless has no right to a specific method for determining earned early release. *In re Fogle*, 128 Wn.2d 56, 61, 904 P.2d 722 (1995) (inmates do not have a statutorily created right to a specific method calculating early release credits).

If the Department has not awarded her the appropriate amount of credit for time served, or has not properly applied the correct amount of good time credit to her convictions, her complaint involves the Department and not the trial court: "the county jails retain plenary authority over the

grant or denial of good-time to offenders within their jurisdiction. The Department is, therefore, entitled to give presumptive legal effect to the certification the county jail provides. The certification does not, however, have legal force if it is based upon an apparent or manifest error of law." *Matter of Williams*, 121 Wn.2d 655, 664, 853 P.2d 444 (1993).

Ms. McCandless fails to establish that she has or will be denied the appropriate credit for time served or earned early release credit.[22] Her personal restraint petition should be dismissed.

V. CONCLUSION

There was sufficient evidence to support the convictions in both the attempt to elude and failure to remain at the scene of an accident cases. Ms. McCandless's claim of a confrontation violation is without support in

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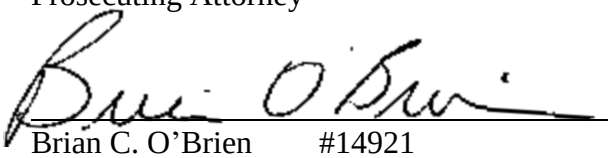
[22] *See Matter of Stuhr*, 186 Wn.2d 49, 52-53, 375 P.3d 1031 (2016):

> The SRA contemplates that an offender may be released from total confinement before serving the full sentence imposed by the court. This is accomplished through "earned release time," which may be granted "for good behavior and good performance" while the offender is in custody. RCW 9.94A.729(1)(a). Policies and procedures for earned release time are "developed and adopted by the correctional agency having jurisdiction in which the offender is confined." *Id*. The SRA gives correctional agencies a high level of discretion to determine whether and how to reward good behavior and good performance with early release, *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 661, 853 P.2d 444 (1993). Correctional agencies are not required to grant the maximum allowable earned release time. *Pullman*, 167 Wn.2d at 214, 218 P.3d 913.

the record, and her conviction for failing to remain and provide information at the scene of an attended accident was proper. The eluding and obstructing convictions are based on separate evidence and different statutes that have different elements; neither double jeopardy clause is implicated by convictions for both crimes. The amended Judgment and Sentence properly provides for the separation of jail and prison time and any complaint regarding credit for time served or good time credit is not supported by the record or simple mathematics.

Dated this 26 day of March, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

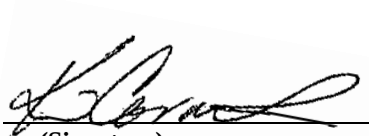
STATE OF WASHINGTON, Respondent, v. ERICKA HELLER, a/k/a ERICKA McCANDLESS, Appellant,	NO. 35241-2-III Consol. With 35746-5-III CERTIFICATE OF MAILING
In re: Personal Restraint Petition of ERICKA HELLER, a/k/a ERICKA McCANDLESS, Petitioner.	

I certify under penalty of perjury under the laws of the State of Washington, that on March 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Robert M. Seines
rseines@msn.com

and mailed a copy to:

Ericka Heller, a/k/a Ericka McCandless,
DOC #776981
Washington CC for Women
9601 Bajacich NW Rd
Gig Harbor, WA 99332

3/26/2018 (Date) Spokane, WA (Place)  (Signature)

SPOKANE COUNTY PROSECUTOR

March 26, 2018 - 11:24 AM

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Superior Court Case Number:	16-1-04268-7

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